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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO TRUJILLO CRUZ,
Plaintiff,
v.
M. GONZALEZ,
Defendant.

CASE NO. 1:17-cv-01548-DAD-MJS (PC)
FINDINGS AND RECOMMENDATION TO DENY MOTION TO PROCEED IN FORMA PAUPERIS
(ECF No. 9, 10)
FOURTEEN (14) DAY OBJECTION DEADLINE

Plaintiff is a state prisoner proceeding pro se in a civil rights action brought pursuant to 42 U.S.C. § 1983.

Before the Court are Plaintiff's motions to proceed in forma pauperis. (ECF Nos. 9, 10.)

I. In Forma Pauperis

28 U.S.C. § 1915 permits a federal court to authorize the commencement and prosecution of an action without prepayment of fees by an individual who submits an affidavit demonstrating that he is unable to pay the fees. However,

[i]n no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

1 The imminent danger exception applies if “the complaint makes a plausible
2 allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time
3 of filing.” Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007).

4 Here, Plaintiff has incurred at least three strikes within the meaning of 28 U.S.C. §
5 1915(g). Plaintiff has filed numerous unsuccessful cases in the Eastern District of
6 California under the names “Guillermo Trujillo Cruz,” “Guillermo Cruz Trujillo,” and
7 “Guillermo Trujillo.” The Court takes judicial notice of the following cases: (1) Cruz v.
8 Munoz, No. 1:14-cv-01215-SAB (PC) (E.D. Cal.) (dismissed for failure to state a claim on
9 May 17, 2016); (2) Cruz v. Munoz, No. 1:14-cv-00976-DLB (PC) (E.D. Cal.) (dismissed
10 for failure to state a claim on May 11, 2016); (3) Cruz v. Ruiz, No. 1:14-cv-00975-SAB
11 (PC) (E.D. Cal.) (dismissed for failure to state a claim on January 6, 2016); 4) Trujillo v.
12 Sherman, 1:14-cv-0140-BAM (PC) (dismissed closed on April 24, 2015, for failure to
13 state a claim, affirmed by the Ninth Circuit on February 23, 2016).

14 The Ninth Circuit recently held that Magistrate Judges do not have jurisdiction
15 over a case until all parties (both served and unserved) have consented to Magistrate
16 Judge jurisdiction. Williams v. King, 875 F.3d. 501 (9th Cir. 2017). “An error in
17 interpreting a statutory grant of jurisdiction is not, however, equivalent to acting with total
18 want of jurisdiction and does not render the judgment a complete nullity.” Jones v. Giles,
19 741 F.2d 245, 248 (9th Cir. 1984) (citing Chicot County Drainage Dist. v. Baxter State
20 Bank, 308 U.S. 371, 376-77 (1940). The dismissal of Plaintiff’s prior cases by a
21 Magistrate Judge may still be properly counted as a strike for purposes of the PLRA
22 since those decisions have become final. See Chicot, at 375 (holding parties who had
23 the opportunity to raise the question of invalidity of jurisdiction are bound by rulings
24 thereunder because they failed to raise it), 376-77 (holding that decision errantly
25 entertained under jurisdiction conferred by statute that was subsequently declared
26 invalid could “not be assailed collaterally”) (citing Cromwell v. County of Sac, 94 U.S.
27 351, 352 (1876); Case v. Beauregard, 101 U.S. 688, 692 (1879); Baltimore Steamship
28 Co. v. Phillips, 274 U.S. 316, 319, 325 (1927); Grubb v. Public Utilities Commission, 281

1 U.S. 470, 479 (1930))). A District Judge in this Court has recently held that Plaintiff's
2 specific strikes remain valid. See Hoffman v. Pulido, Case no. 1:18-cv-00209-AWI-SKO
3 (E.D. Cal.)

4 All of Plaintiff's actions noted above were dismissed before February 26, 2018,
5 when Plaintiff filed the present action. Thus, Plaintiff is subject to 28 U.S.C. § 1915(g)
6 and is precluded from proceeding in forma pauperis in this action unless at the time the
7 complaint was filed, he was in "imminent danger of serious physical injury at the time of
8 filing." Andrews, 493 F.3d at 1055 (internal quotation marks omitted).

9 **II. Plaintiff's Claims**

10 At the time of filing his complaint, Plaintiff was incarcerated at Pelican Bay State
11 Prison. (ECF No. 1.) He since has been returned to Kern Valley State Prison ("KVSP"),
12 where the acts giving rise to the complaint occurred. An additional act occurred at High
13 Desert State Prison. He names M. Gonzalez, Correctional Officer at KVSP, as
14 Defendant.

15 Plaintiff's claims may be summarized essentially as follows:

16 From April 26, 2016 to May 10, 2016, at KVSP, Plaintiff was sexually harassed by
17 Defendant Gonzalez who asked Plaintiff to expose himself.

18 Between May 10, 2016 and July 29, 2016 Defendant Gonzalez verbally
19 threatened Plaintiff and ordered other inmates to assault him because he refused her
20 advances.

21 On July 29, 2016 Plaintiff was transferred to High Desert State Prison. There, on
22 August 01, 2016, he was assaulted because Defendant Gonzalez encouraged others to
23 attack him.

24 **III. Imminent Danger Exception Not Applicable**

25 Plaintiff fails to plausibly allege imminent danger of serious physical injury.

26 A prisoner seeking to invoke the imminent danger exception in § 1915(g) must
27 make specific, credible allegations of imminent danger of serious physical harm. McNeil
28 v. U.S., 2006 WL 581081 (W.D. Wash. Mar. 8, 2006) (citing Kinnell v. Graves, 265 F.3d

1 1125, 1127-28 (10th Cir. 2001), and White v. Colorado, 157 F.3d 1226, 1232 (10th Cir.
2 1998)). Vague, speculative, and non-specific allegations are insufficient. See Pauline v.
3 Mishner, 2009 WL 1505672 (D. Haw. May 28, 2009) (plaintiff's vague and conclusory
4 allegations of possible future harm to himself or others are insufficient to trigger the
5 "imminent danger of serious physical injury" exception to dismissal under § 1915(g));
6 Luedtke v. Bertrand, 32 F.Supp.2d 1074, 1077 (E.D. Wis. 1999) ("[p]laintiff's vague
7 allegation of a conspiracy among the defendants to beat, assault, injure, harass and
8 retaliate against him are not enough. These allegations are insufficient and lack the
9 specificity necessary to show an imminent threat of serious physical injury.").

10 "[i]mminent' ... does not refer only to events that are already taking place, but to
11 those events 'ready to take place' or 'hanging threateningly over one's head.'" Andrews,
12 493 F.3d at 1056 (citation omitted). "A prisoner who alleges that prison officials continue
13 with a practice that has injured him ... in the past will satisfy the 'ongoing danger'
14 standard and meeting the imminence prong of the three-strikes exception." Id. at 1056-
15 57.

16 Here, Plaintiff states that in the past Defendant Gonzalez sexually harassed him
17 and threatened him. There are however no allegations of any ongoing threats or
18 plausible claim of ongoing danger.

19 Plaintiff does allege he was the victim of an assault on August 01, 2016 at High
20 Desert Prison which he claims was at the direction or request of Defendant. However,
21 providing no basis for his claim that Defendant instigated the assault, it appears to be
22 based on mere supposition, simple speculation. Even if there were reason to suspect
23 Defendant motivated that assault more than one and one half years ago, its age
24 suggests it was a onetime event not likely to reoccur.

25 Accordingly, his application to proceed in forma pauperis should be denied.

26 **IV. Conclusion and Recommendation**

27 Accordingly, it is HEREBY RECOMMENDED that Plaintiff's motions to proceed in
28 forma pauperis be DENIED, and that Plaintiff be required to pay the filing fee in full

1 before proceeding in this action.

2 The findings and recommendation are submitted to the United States District
3 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
4 fourteen (14) days after being served with the findings and recommendation, any party
5 may file written objections with the Court and serve a copy on all parties. Such a
6 document should be captioned "Objections to Magistrate Judge's Findings and
7 Recommendation." Any reply to the objections shall be served and filed within fourteen
8 (14) days after service of the objections. The parties are advised that failure to file
9 objections within the specified time may result in the waiver of rights on appeal.
10 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
11 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: March 22, 2018

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE